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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964
NO. 640

BEN B. BURROWS,

Petitioner

VS.

WAGGONER CARR, THE ATTORNEY GENERAL OF THE STATE OF TEXAS, THOMAS C. LYNCH, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, AND FORREST M. SMITH, ERNEST M. GROOS AND T. C. FROST, TRUSTEES OF THE MORRISON TRUST,

Respondents

BRIEF OF RESPONDENT WAGGONER CARR, THE ATTORNEY GENERAL OF THE STATE OF TEXAS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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TO THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

This is a suit brought by Forrest M. Smith, Ernest M. Groos, and T. C. Frost, Trustees of the Morrison Trust, created in the will of R. W. Morrison, Deceased, for declaratory judgment seeking construction of the will of R. W. Morrison, Deceased, and directions thereunder.

OPINION BELOW

The Court of Civil Appeals for the Fourth Supreme Judicial District of Texas at San Antonio in its opinion found in 373 S.W.2d 514, held that Texas law governs this testamentary trust which has its situs in Texas and is composed of property located in Texas, and which was established by a testator residing in Texas at death, and is managed by trustees residing in Texas.

JURISDICTION

Petitioner's Request for Writ of Error to the Supreme Court of Texas was denied on March 18, 1964. The Motion for Rehearing of the Writ of Error was denied on July 15, 1964. The ninety day time limit for the filing of the petition for certiorari and the certified record required by Rule 22 of this Court expired on October 13, 1964.

A certified copy of the record was not received and the petition in this matter was not docketed in this Court until October 29, 1964, more than ninety days since the entry of judgment by the Supreme Court of Texas, and Motion for Rehearing was overruled, and the period for applying for a writ of certiorari has not been extended by a Justice of this Court (U.S.C., Title 28, Sec. 2101(c) and Rule 22 of this Court).

Therefore, it appears that Petitioner's application for a writ of certiorari is out of time and should be denied.

QUESTION PRESENTED

Whether the validity of the provisions of this trust will be determined by application of Texas law.

STATEMENT OF THE CASE

This case presents a situation where the testator was domiciled in Texas, executed his will in Texas, the will was probated in Texas, the will provided for a trust involving real and personal property located in Texas, named trustees, all of whom reside in Texas, provided for the administration of the trust to be in Texas, and provided for the expenditure of part of the trust funds in California for a purpose which is illegal in Texas.

ARGUMENT

The provisions under Paragraph IV (c) in the will of R. W. Morrison, deceased, relating to the establishment, maintenance and operation of Clinic-Hospitals are as follows:

> "4. After payment of said annuities fifty percent (50%) of the net income annually remaining available for distribution shall be used for the establishment and maintenance and operation of one or more scientific Clinic-Hospitals which shall be directed by a committee of three, to be composed of Dr. Ben B. Burrows, who will faithfully devote his entire time and attention as directing member, and two associate members, who may be designated by R. W. Morrison. In event he fail(s) to designate, then said two other members shall be selected by said Board of Trustees from five names to be recommended by Dr. Burrows. Should Dr. Burrows at any time decline to further act, or become mentally or physically permanently incapacitated from acting, the Board of Trustees shall select a successor. Each directing member or committee successor must be trained in the same art and science as practiced and advocated by the said Dr. Burrows, and, in the opinion of said trustees, must be a man of high character and worthy of the posi-

tion The compensation of Dr. Burrows shall be Twenty-Five Thousand Dollars ($25,000.00) per year, and the compensation of the other two members serving with him shall be Twelve Thousand Dollars ($12,000.00) per year each, all of which compensations are minimum and will be increased as hereinafter stipulated and may be increased at any time by majority vote of trustees."

"5. Said Clinic-Hospitals shall be devoted exclusively to the scientific study, research and improvement of existing methods, and to the development of new methods of treating and of preventing human sickness, particularly with respect to the effects on human health of nutrition, blood chemistry, radionics and electricity, and to methods of non-medical healing, and to applying the knowledge so acquired in the treatment of human sickness."

"6. Should said committee fail or refuse to operate any Clinic-Hospital herein provided for in full accordance with the directions contained herein, or to properly account for all receipts coming into their hands and all disbursements therefrom, said trustees shall remove each member of said committee so failing or refusing and shall select and appoint their successors. Annual audits shall be made and delivered to the trustees by a C.P.A. selected by them of all Clinic-Hospital funds and accounts."

"7. Reasonable charges for service rendered by said Clinic-Hospital shall be made to all who may avail themselves thereof and who may be financially able to pay therefor, but no needy person shall ever be denied service solely by reason of inability to pay therefor, and all payments received for such services shall be paid to the committee operating the Clinic-Hospital and shall be used by them solely for the purposes thereof."

"8. Activities of the trust shall at all times be under the control and supervision of said Board of Trustees, but said hospital committee shall be the sole authority as to all Clinic-Hospital operations."

". . .

"15. Of the Clinic-Hospitals herein provided for, the first one consisting of accommodations for not more than 50 patients which shall be established, operated and maintained in California and at the expiration of not less than two years from the date of the establishment of this first Clinic-Hospital, if funds are available, and if in the judgment of the committee of the Clinic-Hospital it is advisable to do so, a second Clinic-Hospital having accommodations for not less than 100 patients shall be established, operated and maintained in San Antonio, Texas, provided the laws of the State of Texas clearly permit its establishment at that time. Should the laws of the State of Texas not permit the establishment of the second unit as above provided in San Antonio, Texas, and should the laws of the State of New Mexico permit the establishment of such a Clinic-Hospital in that State, then if in the judgment of the Committee it is advisable to do so, they shall establish, operate and maintain a second Clinic-Hospital in the State of New Mexico. In the event the laws of the State of Texas clearly permit the establishment of the second Clinic-Hospital in Texas, then at the discretion of the majority of the Committee, funds being available, they may at any time thereafter establish a third Clinic-Hospital in the State of New Mexico. The compensation of the members of the Committee, including the directing member, shall be increased 50% when Clinic-Hospital No. 2 is established and a like amount when Clinic-Hospital No. 3 is established. In the event the laws of either or both the State of Texas and New Mex-

ico do not clearly permit the establishment of Clinic-Hospitals Nos. 2 and 3, then the members of the Committee shall establish such Clinic-Hospitals in whatever States in their judgment the greatest good will be accomplished through their establishment in such states."

The Trial Court decreed, and the Court of Civil Appeals agreed, stating that this provision of the trial court's judgment is fully supported by the undisputed facts as follows:

> "That the clinic-hospital committee, to be composed of chiropractors licensed in the State of California and trained in the same art and science as that practiced and advocated by Dr. Ben B. Burrows, the directing committee member, if doing research and study and applying the methods of nutrition, blood chemistry, physical therapy, radionics, electricity and other methods of non-medicinal [sic] healing in the treatment of human illness in a clinic-hospital established in the State of Texas, would be in violation of the laws and public policy of the State of Texas and in particular the Medical Practice Act, the Chiropractic Act and Hospital Licensing Act of the State of Texas, and it is the judgment of this court that the establishment, maintenance and operation of such a clinic-hospital in the State of Texas in the manner set forth in the testator's will would be violative of the laws and public policy of the State of Texas and such clinic-hospital provisions of said testator's will are invalid in the State of Texas."

The Trial Court found:

> "That the validity of the clinic-hospital provisions of the trust insofar as it authorizes the acts to be performed by such clinic-hospital committee in the State of California is to be determined with

reference to California law and not Texas law. That the above acts to be performed by such clinic-hospital committee would not be in violation of the laws or the public policy of the State of California, and, therefore, the Board of Trustees are authorized to carry out the clinic-hospital provisions of the Morrison Trust in the State of California as expeditiously as said Trustees may reasonably in their judgment do so."

As to this finding, the Court of Civil Appeals said:

"We do not agree with this part of the judgment, and the trial court committed reversible error in so decreeing. The laws of Texas and not California should here be applied."

The Trial Court decreed and the Court of Civil Appeals agreed that:

" '(a) That the domicile of the testator, R. W. Morrison, at the time of his death was in Bexar County, Texas; that the last will of R. W. Morrison was probated in Bexar County, Texas, and his estate was administered in Bexar County, Texas; that all of the assets of the Morrison Trust are situated and have their situs within the State of Texas, and all of the Trustees of the Morrison Trust are, and are to be, residents of the State of Texas.

" '(b) That the Morrison Trust is to be continuously administered and treated as one trust, with the corpus and income handled together and treated as a single fund, and the entire net income therefrom each year, after payment of the annuities specified in said will, shall be credited on the books of the trust by the Trustees as follows: 50% to the clinic-hospitals account or fund; 25% to Baylor University, and 25% to the fund for perpetuation, preservation and maintenance of the physical properties of the trust as in said will

provided; that income not distributed each year shall be invested and handled along with other funds of the trust as a single fund, as the Trustees, in the exercise of their discretion and judgment, deem in the best interest of the trust, and all income shall accrue to the benefit of the entire trust.

"'(c) That it was the intention of the testator that the Trustees of the Morrison Trust at all times administer said trust within the State of Texas and not elsewhere; that the same is now being administered wholly within the State of Texas, and that the income from said trust be used for the purposes as stated and directed in said will; that the corpus of the Morrison Trust shall remain in Texas and be at all times administered by the Board of Trustees of the Morrison Trust within the State of Texas and not elsewhere, and the same will be at all times subject to the jurisdiction of the courts of the State of Texas.'"

Petitioner cites Article IV, Section 1 of the United States Constitution, that "Full faith and credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State" and, the 14th Amendment, Section 1 of the United States Constitution that "Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

There is no question in this case of a denial or violation of the equal protection of the laws clause of the United States Constitution, or of a denial of Petitioner's right to due process of law as therein provided. Neither is there in this case any failure to give full faith and credit to the public Acts, Records and judi-

cial Proceedings of another State in violation of Article IV, Section 1 of the United States Constitution.

The Court of Civil Appeals rightly stated in this case that:

> "Certainly we will not have Texas land and personal property administered by Texas Trustees under Texas law and the revenue sent to another State for a purpose which is criminal under our laws although it is not condemned as criminal in the foreign jurisdiction. For this Court to hold otherwise would be to take an untenable and inconsistent position which no court should take."

It would be well to clarify the fundamental difference between the argument urged by Petitioner, and the position of the Attorney General of Texas which he has maintained throughout the trial of this matter in the District Court in the Court of Civil Appeals, and in the Supreme Court of Texas.

Petitioner argues that an issue in this case is whether or not the determination of fiscal policies is by itself a sufficient interest through which the State of Texas can assert its laws over that of California and give extra-territorial effect to them. That, "How or why it is 'criminal' is left entirely to conjecture and not one word is stated to define or set forth the nature of the crime that is supposed to be committed in carrying out the testator's trust." That "There is no question that the terms of the trust provided that it was the clinic-hospital that should research, that treatment be given by a duly licensed practitioner, and that Dr. Burrows would be nothing more nor less than the directing member of the administrative clinic-hospital committee." That, "At no point within the trust instrument was

Dr. Burrows personally required to perform treatment."

On the other hand, it has been consistently maintained, and is so here, by the Attorney General of Texas that there can be no doubt from reading the entire Morrison will, that these Clinic-Hospitals were to be established and operated around the actual treatment of patients by Dr. Burrows, and his committee similarly trained, as provided in paragraph IV (c) 5, of the Morrison will:

> "5. Said Clinic-Hospitals shall be devoted exclusively to the scientific study, research and improvement of existing methods and to the development of new methods of treating and of preventing human sickness, particularly with respect to the effects on human health of nutrition blood chemistry, radionics and electricity, and to methods of non-medical healing, and to applying the knowledge so acquired in the treatment of human sickness."

The whole of the clinic hospital plan in the Morrison will is so clouded with illegality that no part of it can stand.

The Court of Civil Appeals of Texas held in this case, and the Supreme Court of Texas upheld, that:

> "[1] It is quite clear that the establishment and maintenance of such clinic-hospital is not only contrary to the civil laws of Texas, but is also denounced as a crime by our criminal laws. Medical Practice Act, Art. 4495, etc., Vernon's Ann. Civ. Stats.; Art. 739 Vernon's Penal Code; Art. 742 V.P.C.; Texas Hospital Licensing Law, Art. 4437f, Sec. 16, Vernon's Ann. Civ. Sts.; The Chiropractic Act, Art. 4512b, V.A.C.S. See also Wilson

v. State Board of Naturopathic Examiners, Tex. Civ. App., 298 S.W.2d 946."

"[2] There can be no question as to where the situs of the Morrison Trust is; it is in Bexar County, Texas. R. W. Morrison resided in Texas at the time of his death, the property put into the trust was located in Texas, the trustees are to continuously reside in Texas, and are to manage the Morrison Trust in Texas. Under such circumstances, the trust must be governed by the laws of Texas, and the validity of the various provisions of the will must be determined by the laws of Texas. Sec. 377, American Law Institute, Restatement of the Law of Trusts; 42 Tex.Jur. 672, § 64; 44 Tex. Jur. 773, § 206; American Law Institute, Restatement of Conflict of Laws, § 487; Stumberg, Principles of Conflict of Laws, p. 397; Page on Wills, 3rd Ed., § 164.7, Trusts; Beale, The Conflict of Laws, § 243.1; Cavers, 44 Harvard Law Review 161; Stumberg 34 Texas Law Review; Annotations, 89 A. L.R. 1023, 139 A.L.R. 1129, and cases cited therein. Toledo Society for Crippled Children v. Hickok, 152 Tex. 578, 261 S.W.2d 692, 43 A.L.R.2d 553, certiorari den., 347 U.S. 936, 98 L.Ed. 1086, 74 S.Ct. 631, 115 A.L.R. 802. Lavel v. Staffel, 64 Tex. 370; Holman v. Hopkins, 27 Tex. 38; Munger v. Munger, Tex.Civ.App., 298 S.W. 470; Albuquerque Nat. Bank v. Citizens Nat. Bank in Abilene, 5 Cir., 212 F.2d 943; DeVaughn v. Hutchinson, 165 U.S. 566, 17 S.Ct. 461, 41 L.Ed. 827; Jenkins v. First Nat. Bank in Dallas, 107 F.2d 764, Fifth Circuit Court of Appeals."

"[3] The Morrison Trust is a charitable trust created under the laws of Texas, Art. 7425b-1 to Art. 7425b-47, Vernon's Ann. Civ Stats. Art. 7425b-3 provides, among other things: 'A trust in relation to, or consisting of, real, personal or mixed property may be created or established for any use or purpose which is not illegal.' "

> "[4] Certainly the establishment and maintenance of the clinic-hospitals provided for in the will is against the public policy, the Civil Statutes and the Criminal Statutes of this State, and the fact that one of the hospitals would be established, maintained and operated in California does not change the situation. . . ."

The establishment, maintenance, and operation of the clinic-hospitals for the purpose, as provided in the Morrison will, is illegal under the laws of Texas, as shown by the authorities cited in the Court of Civil Appeals opinion in this case. The performance of the Morrison Trust, as proposed by Petitioner in his application for writ of certiorari, for research, the advancement of the chiropractic profession, and the determination of the fiscal policies only, of such clinic hospitals, without the treatment of human sickness, would be to depart from the stated provisions of the Morrison will.

The argument of Petitioner as to the right of a chiropractor to act as a consultant, do research and study, and advance and more fully understand his profession is not pertinent.

There is no Federal question presented.

CONCLUSION

It is therefore respectfully submitted that this Petition for Writ of Certiorari should be denied for the foregoing reasons.

Dated: November 24, 1964.

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